IN THE

Supreme Court of the United States

October Term, 1978

No. 78-725

SOVEREIGN CONSTRUCTION COMPANY, LTD.,
Petitioner,

v.

CITY OF PHILADELPHIA,
Respondent.

REPLY OF PETITIONER TO THE BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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Petitioner, Sovereign Construction Company, Ltd. (Sovereign) submits this Brief in reply to the Brief in Opposition filed by Respondent, City of Philadelphia (City).

The City, in its Brief in Opposition, quoting from the Opinion of the District Court, contends that Sovereign points to no specific regulation or statutory provision as the source of its federal causes of action, and has not invoked this Court's federal question jurisdiction (Brief in Opposition, p. 4).

The Complaint in this action makes repeated and express references to Title II of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, 33 U.S.C. § 1281, *et seq.* (FWPCA) and to Environmental Protection Agency regulations (¶¶ 14, 17, 18, 20, 22), as a basis for assertion of its legal rights (¶ 26). More importantly, the Opinion of the District Court, prefacing that contention, expressly recognized and stated:

> "Sovereign also asserts that its legal rights under the Federal Water Pollution Control Act Amendments of 1972 and under the EPA grant administration regulations have been violated by the City's actions."

Although jurisdiction of the Court was founded on diversity of citizenship and amount in controversy pursuant to 28 U.S.C. 1332, nevertheless, and contrary to the City's contention (Brief in Opposition, p. 6), Sovereign did invoke federal-question jurisdiction by the contents of its pleading. This Court has held that where facts alleged in the Complaint are sufficient to establish such jurisdiction, and a Complaint appears jurisdictionally correct when filed, it does not matter that the Complaint does not in so many words assert § 1331(a) as a basis of jurisdiction: *cf.* footnote 6 in *Andrus v. Charlestone Stone Products Co., Inc.*, ... U.S. ...., 98 S.Ct. 2002, 56 L.Ed. 2d 570 (1978). Thus, Sovereign is entitled to such benefits of federal substantive law as may be afforded by the provisions of the FWPCA.

The interest of Sovereign is within the zone of interests encouraged and protected by the FWPCA. Section 1251 of FWPCA (Brief in Opposition, Appendix B) sets forth a Congressional declaration of goals and policies for achieving control of water pollution. In Subsections (a) and (e) of the declaration it is stated:

> "(a) . . . In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter . . ."
>
> "(e) *Public participation in the* development, revision, and *enforcement of any regulation*, standard, effluent limitation, plan, or program *established by the Administrator* or any State under this chapter *shall be provided for, encouraged, and assisted by the Administrator* and the States. The Administrator, in cooperation with the States, *shall develop and publish regulations* specifying minimum guidelines *for public participation in such processes.*" (italics supplied)

The "zone of interest" is reflected in the action which was taken by the Regional Administrator. In reversing the City's rejection of all bids, the Regional Administrator in his Determination (to which the Brief in Opposition makes reference; pp. 3, 6), undertook to find *inter alia* that under the provisions of FWPCA and regulations enacted in conformity therewith, the right of a grantee of federal funds to reject all bids is not without limits, citing that the EPA has established as a matter of regulation a reliance on the procurement system of a grantee, with the important caveat that it must comply with minimum federal requirements, the first of which is articulated in 40 CFR § 35.936-3 to insure free and open competition, and that in this instance there was no ground shown for the rejection of all bids (Complaint ¶ 18).

The remedy which Sovereign seeks is fully consistent with and within the scope of the principles stated by the Court in *Cort v. Ash*, 422 U.S. 66, 45 L.Ed. 2d 26, 95 S.Ct. 2080 (1975). In *Cort*, the Court states that in determining whether a private remedy is implicit in a statute not expressly providing one, *several* factors are *relevant*. That does not imply that there are not other important and relevant factors nor does that statement imply that all of the *several* factors which are men-

tioned are necessarily required in every case. As to the *first*, while bidders and suppliers of labor and material for construction of water pollution control projects are perhaps not of the class "for whose *especial* benefit the statute was enacted" it is not reasonably fair to conclude that they therefore have no remedy against wrong-doing. That is consistent with FWPCA § 1365 authorizing Citizen suits and providing:

> "(e) *Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law* to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." (italics supplied)

The *second* factor mentioned in *Cort* is the existence of any indication of legislative intent, explicit or implicit, either to create such a remedy *or deny one*. Certainly there is no explicit or implicit evidence of any intent *to deny* a remedy to a successful bidder on a FWPCA project—and from the declaration of Congressional goals and policies there is disclosure of at least an implicit intent that persons, including bidders who have been wronged, should not be denied an appropriate remedy in the courts of the United States to facilitate and promote the accomplishment of the national pollution control program. The *third* relevant factor mentioned by the Court in *Cort* is consistency with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff. Certainly a bidder on a water pollution control project who has been wronged by arbitrary and capricious action of a federal grantee should be accorded a judicial remedy which in turn should be recognized as consistent with the underlying purposes of the legislative scheme for construction of local projects with the assistance of federal funds. The *fourth* relevant factor suggested by *Cort* is whether the cause of action is one traditionally relegated to state law so that it

would be inappropriate to infer a cause of action based solely on federal law. Invocation of federal law for the protection of bidders upon projects being funded with federal money and in particular through federal grants, *traditionally* have not been relegated to state law for a cause of action.

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